IN THE

Supreme Court of the United States

HELEN C. FRICK, Plaintiff in Error, vs. COMMONWEALTH OF PENNSYLVANIA.	122 No. ~~442~~ October Term, 1923.
HELEN C. FRICK, Plaintiff in Error, vs. COMMONWEALTH OF PENNSYLVANIA.	123 No. ~~443~~ October Term, 1923.
ADELAIDE H. C. FRICK et al., executors, Plaintiffs in Error, vs. COMMONWEALTH OF PENNSYLVANIA.	124 No. ~~444~~ October Term, 1923.
ADELAIDE H. C. FRICK et al., executors, Plaintiffs in Error, vs. COMMONWEALTH OF PENNSYLVANIA.	125 No. ~~445~~ October Term, 1923.

BRIEF FOR PLAINTIFFS IN ERROR.

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CONTENTS OF BRIEF.

TABLE OF CASES.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

The Federal Questions Involved.

The Supreme Court of Pennsylvania has interpreted the tax levied under the Pennsylvania statute of 1919 as a tax on the right of transmission of property owned by decedent. The question is whether, in measuring the tax by the clear value of his estate, the act violates the Constitution of the United States by including the value of tangible articles of personalty with a definite and permanent situs in other states, and by prohibiting the deduction of amounts paid to the United States as an estate tax and to other states as taxes on the transfer of shares of stock.

The Manner In Which the Questions Are Raised.

These four cases involve the same questions. The assignments of error are identical. By stipulation filed, they are all to be disposed of on the record at No. 442.

These cases are writs of error to the Supreme Court of Pennsylvania allowed by the Chief Justice of the Supreme Court of Pennsylvania. The writ of error at No. 442 was sued out by Helen C. Frick, one of the residuary legatees under the will of Henry C. Frick, deceased, in a proceeding which originated in the Orphans' Court of Allegheny County, Pennsylvania, in which the property owned by Mr. Frick at the time of his death was appraised for inheritance tax purposes. The writ of error at No. 444 October Term, 1923, was a writ of error sued out in the same proceeding by the executors of Mr. Frick's will.

The writ of error at No. 443 October Term, 1923, was a writ of error sued out by Helen C. Frick, one of the residuary legatees, from a decree of distribution to the Commonwealth of Pennsylvania, originating in a separate proceeding in the Orphans' Court of Allegheny County, Pennsylvania. The writ at No. 445 October Term, 1923, was sued out by the executors in the same proceeding.

The decree entered in each of these cases is a final judgment or decree in a suit in the highest court of the State in which a decision in the suit could be had, and is one where the validity

of the statute of the State of Pennsylvania and of the authority exercised under a statute of the State of Pennsylvania was drawn in question on the ground that the said State statute and the authority exercised by the State officials under said statute was repugnant to the Constitution and laws of the United States, and the decision of the Supreme Court of Pennsylvania and of the Orphans' Court of Allegheny County was in favor of the validity of said State statute and of the authority exercised.

These are cases which may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error under the provisions of Section 237 of the Judicial Code. As a matter of precaution, however, petitions have been filed in each of these cases for a writ of *certiorari.*

ASSIGNMENTS OF ERROR.

(Record, 125ff., fols. 349ff.)

FIRST. The Supreme Court of Pennsylvania erred in entering the following judgment in said cases:

> "The judgment of the court below is reversed, in so far as relates to the legacy of $2,000,000 for the maintenance of the park given to the City of Pittsburgh, and is affirmed as respects all the other questions raised on these six appeals; the costs on all the appeals to be paid by the estate."

The judgment of the Supreme Court of Pennsylvania deprives the plaintiffs in error, the said Adelaide H. C. Frick, Helen C. Frick, Childs Frick, Henry C. McEldowney and William Watson Smith, executors, and the said Helen C. Frick, individually, as one of the residuary legatees, of their property without due process of law and deprives them of the equal protection of the laws, in violation of the Fourteenth Article of Amendment to the Constitution of the United States, and also is repugnant to clause 1 of Section 8 of Article I of the Constitution of the United States in that it interferes with the power of Congress to lay and collect taxes, duties, imposts and excises, and also to clause 2 of Article VI of the Constitution of the United States, in that it denies that the said Constitution, and the laws of the United States made in pursuance thereof, to wit, among others, Sections

400 to 410, inclusive, of an Act of Congress of the United States entitled: "An Act to provide revenue, and for other purposes," approved February 24, 1919 (United States Statutes at Large, Vol. 40, part 1, pages 1096 to 1101), and Section 3467 of the United States Revised Statutes are the supreme law of the land.

SECOND. The Supreme Court of Pennsylvania erred in not reversing the decree of the Orphans' Court of Allegheny County, Pennsylvania, for the reason that the said decree deprives the plaintiffs in error, the said Adelaide H. C. Frick, Helen C. Frick, Childs Frick, Henry C. McEldowney and William Watson Smith, executors, and the said Helen C. Frick, individually, as one of the residuary legatees, of their property without due process of law, and deprives them of the equal protection of the laws, in violation of the Fourteenth Article of Amendment to the Constitution of the United States and also is repugnant to clause 1 of Section 8 of Article I of the Constitution of the United States in that it interferes with the power of Congress to lay and collect taxes, duties, imposts and excises, and also to clause 2 of Article VI of the Constitution of the United States in that it denies that the said Constitution, and the laws of the United States made in pursuance thereof, to wit, among others, Sections 400 to 410, inclusive, of an Act of Congress of the United States entitled: "An Act to provide revenue, and for other purposes," approved February 24, 1919 (United States Statutes at Large, Vol. 40, part 1, pages 1096 to

1101), and Section 3467 of the United States Revised Statutes are the supreme law of the land.

THIRD. The Supreme Court of Pennsylvania erred in affirming the decision of the Orphans' Court of Allegheny County, Pennsylvania, for the reason that said distribution of $1,188,248.16 to the Commonwealth of Pennsylvania includes a tax, to the amount of $664,686.61, upon tangible articles of personal property situated at the time of the death of the said Henry C. Frick in the States of New York and Massachusetts.

The ground upon which this assignment of error is founded is that so much of Article I, Section 1, of the Act of the General Assembly of the State of Pennsylvania entitled "An Act providing for the imposition and collection of certain taxes upon the transfer of property passing from a decedent who was a resident of this Commonwealth at the time of his death, and of property within this Commonwealth of a decedent who was a non-resident of the Commonwealth at the time of his death; and making it unlawful for any corporation of this Commonwealth, or national banking association located therein, to transfer the stock of such corporation or banking association, standing in the name of any such decedent, until the tax on the transfer thereof has been paid; and providing penalties; and citing certain acts for repeal," approved the twentieth day of June, A. D. 1919 (Pamphlet Laws, page 521), as provides that a tax shall be imposed upon the

transfer of any property or of any interest therein or income therefrom to persons or corporations by will or by the intestate laws of this Commonwealth from any person dying seized or possessed of the property while a resident of the Commonwealth, whether the property be situated within this Commonwealth or elsewhere, as construed by the Orphans' Court of Allegheny County, Pennsylvania, and this Court [the Supreme Court of Pennsylvania], is invalid on the ground of its being repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States in that it deprives the estate and the residuary legatees of property without due process of law.

FOURTH. The Supreme Court of Pennsylvania erred in affirming the decision of the Orphans' Court of Allegheny County, Pennsylvania, for the reason that the amount of $1,188,248.16 distributed by the Orphans' Court of Allegheny County to the State of Pennsylvania includes a tax on an estimated value of the residuary estate without deducting from the estimated gross estate the inheritance taxes paid other states on the transfer of real estate in other states.

The ground upon which this assignment of error is founded is that in ascertaining the net estate no deduction was made for inheritance taxes paid to other states, which inheritance taxes so paid consisted of taxes on the transfer of real estate situate in other jurisdictions than Penn-

sylvania, and the imposition of such a tax will deprive the estate and the residuary legatees of their property without due process of law in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States and also of the equal protection of the laws in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

NOTE.—*This (Fourth) assignment of error is withdrawn.*

FIFTH. The Supreme Court of Pennsylvania erred in affirming the decision of the Orphans' Court of Allegheny County, Pennsylvania, for the reason that the amount of $1,188,248.16 distributed by the Orphans' Court of Allegheny County to the State of Pennsylvania includes a tax on the estimated value of the residuary estate without deducting from the estimated gross estate the inheritance taxes paid other states on the transfer of shares of stock of corporations of other states.

The ground upon which this assignment of error is founded is that in ascertaining the net estate no deduction was made for inheritance transfer taxes paid to other states, which inheritance taxes so paid consisted of taxes on the transfer of shares of capital stock of corporations incorporated in other states than Pennsylvania and the imposition of such a tax will deprive the estate and the residuary legatees of their property without due process of law, and

also deprive them of the equal protection of the laws in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

SIXTH. The Supreme Court of Pennsylvania erred in affirming the decision of the Orphans' Court of Allegheny County, Pennsylvania, for the reason that the amount of $1,188,248.16 distributed by the Orphans' Court of Allegheny County to the State of Pennsylvania includes a tax on the estimated value of the residuary estate without allowing a deduction for or on account of taxes paid or to be paid on said estate to other states.

The ground upon which this assignment of error is founded is that so much of Article I, Section 2, of the Act of the General Assembly of the State of Pennsylvania, entitled "An Act providing for the imposition and collection of certain taxes upon the transfer of property passing from a decedent who was a resident of this Commonwealth at the time of his death, and of property within this Commonwealth of a decedent who was a non-resident of the Commonwealth at the time of his death; and making it unlawful for any corporation of this Commonwealth, or national banking association located therein, to transfer the stock of such corporation or banking association, standing in the name of any such decedent, until the tax on the transfer thereof has been paid, and providing penalties; and citing certain acts for repeal," approved the

twentieth day of June, 1919 (Pamphlet Laws, page 521), as provides that, in ascertaining the clear value of estates subject to the tax, the only deductions to be allowed from the gross values of such estates shall be the debts of the decedent and the expenses of the administration of such estates, and no deduction whatever shall be allowed for or on account of any taxes paid on such estate to any other State or Territory, as construed by the Auditing Judge [and the Supreme Court of Pennsylvania], is invalid on the ground of its being repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States in that it deprives the estate and the residuary legatees of property without due process of law and also denies to them the equal protection of the laws.

SEVENTH. The Supreme Court of Pennsylvania erred in affirming the decision of the Orphans' Court of Allegheny County, Pennsylvania, for the reason that the amount of $1,188,248.16, distributed by the Orphans' Court of Allegheny County to the State of Pennsylvania, includes a tax on the estimated tax value of the estate without deducting from the estimated value the amount paid the United States as an estate tax.

The ground upon which this assignment of error is founded is that so much of Article I, Section 2, of the Act of the General Assembly of the State of Pennsylvania, entitled "An Act providing for the imposition and collection of certain

taxes upon the transfer of property passing from a decedent who was a resident of this Commonwealth at the time of his death, and of property within this Commonwealth of a decedent who was a non-resident of the Commonwealth at the time of his death; and making it unlawful for any corporation of this Commonwealth, or national banking association located therein, to transfer the stock of such corporation or banking association, standing in the name of any such decedent, until the tax on the transfer thereof has been paid; and providing penalties; and citing certain acts for repeal," approved the twentieth day of June, 1919 (Pamphlet Laws, page 521), as provides that, in ascertaining the clear value of estates subject to the tax, the only deductions to be allowed from the gross values of such estates shall be the debts of the decedent and the expenses of the administration of such estates, and no deduction whatever shall be allowed for or on account of any taxes paid on such estate to the Government of the United States, as construed by the Auditing Judge [and by the Supreme Court of Pennsylvania], is invalid on the ground of its being repugnant to clause 1 of Section 8 of Article I of the Constitution of the United States in that it interferes with the power of Congress to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States, and also to clause 2, of Article VI of the Constitution of the United States in that it denies that the said Constitution, and the laws of the United States made in pursu-

ance thereof, to wit, among others, Sections 400 to 410, inclusive, of an Act of the Congress of the United States, entitled "An Act to provide revenue, and for other purposes," approved February 24, 1919 (United States Statutes at Large, Vol. 40, part 1, pages 1096 to 1101), and Section 3467 of the United States Revised Statutes are the supreme law of the land, and that the judges in every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding, and also to clause 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that it deprives the estate and the residuary legatees of property without due process of law and also denies to them the equal protection of the laws.

EIGHTH. The Supreme Court of Pennsylvania erred in affirming the decision of the Orphans' Court of Allegheny County, Pennsylvania, for the reason that the amount of $1,188,248.16, distributed by the Orphans' Court of Allegheny County to the State of Pennsylvania includes a tax on the estimated value of the estate without allowing a deduction from the estimated value of the gross estate of the Pennsylvania inheritance taxes paid on the general and specific legacies and devises.

The ground upon which this assignment of error is founded is that Article I, Section 2, of the Act of the General Assembly of the State of Pennsylvania, entitled "An Act providing for the imposition and collection of certain taxes upon

the transfer of property passing from a decedent who was a resident of this Commonwealth at the time of his death, and of property within this Commonwealth of a decedent who was a non-resident of the Commonwealth at the time of his death; and making it unlawful for any corporation of this Commonwealth, or national banking association located therein, to transfer the stock of such corporation or banking association, standing in the name of any such decedent, until the tax on the transfer thereof has been paid; and providing penalties; and citing certain acts for repeal," approved the 20th day of June, 1919 (Pamphlet Laws, page 521), providing that "All taxes imposed by this act shall be at the rate of two per centum upon the clear value of the property subject to such tax passing to or for the use of father, mother, husband, wife, children, lineal descendants born in lawful wedlock, legally adopted children, children of a former husband or wife, or the wife or widow of the son, of a person dying seized or possessed thereof, and also on the clear value of such property passing from the mother of an illegitimate child, or from any person of whom the mother is a lineal descendant, to such child, his wife, or widow, and passing from an illegitimate child to his mother; and at the rate of five per centum upon the clear value of the property subject to such tax passing to or for the use of any other person or persons, bodies corporate or politic; to be paid for the use of the Commonwealth. In ascertaining the clear value of such estates, the only deductions to be allowed from the gross values of such estates shall be the

debts of the decedent and the expenses of the administration of such estates, and no deduction whatsoever shall be allowed for or on account of any taxes paid on such estate to the Government of the United States or to any other State or Territory," as construed by the Orphans' Court of Allegheny County, Pennsylvania, and this Court is invalid on the ground of its being repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States in that it deprives the estate and the residuary legatees of property without due process of law, and also denies to them the equal protection of the laws.

NOTE.—*This (Eighth) assignment of error is withdrawn.*

NINTH. The Supreme Court of Pennsylvania erred in affirming the decision of the Orphans' Court of Allegheny County, Pennsylvania, for the reason that the amount of $1,188,248.16, distributed by the Orphans' Court of Allegheny County to the State of Pennsylvania includes in reality a tax not only upon the value of the estate under the jurisdiction of the State of Pennsylvania, but, in addition thereto, a tax on the taxes paid upon the estate to the United States and the various other states of the United States and the Dominion of Canada upon property, real and personal, situated in such other states and which was beyond the jurisdiction and taxing power of the State of Pennsylvania.

BRIEF FOR PLAINTIFFS IN ERROR.

NOTE.—This case in the Supreme Court of Pennsylvania is reported as *Frick's Estate*, 277 Pa., 242 (Advance Reports for June 22, 1923).

The Supreme Court of Pennsylvania has interpreted the tax levied under the Pennsylvania statute of 1919 as a tax on the right of transmission of property owned by decedent. The question is whether, in measuring the tax by the clear value of his estate, the act violates the Constitution of the United States by including the value of tangible articles of personalty with a definite and permanent situs in other states, and by prohibiting the deduction of amounts paid to the United States as an estate tax and to other states as taxes on the transfer of shares of stock.

THE MATERIAL PARTS OF THE PENNSYLVANIA STATUTE are the title and parts of Section 1 and Section 2 of Article I of an Act approved June 20, 1919, Pamphlet Laws of 1919, page 521, West Company's Pennsylvania Statute Law, Section 20465ff, Record in this case, pages 64 and 65.

The title of the act and that part of Article I which relates to the tax upon tangible chattels located outside the state are as follows:

"AN ACT

Providing for the imposition and collection of certain taxes upon the transfer of property passing from a decedent who was a resident of this Commonwealth at the time of his death, and of property within this Commonwealth of a decedent who was a non-resident of the Commonwealth at the time of his death; and making it unlawful for any corporation of this Commonwealth, or national banking association located therein, to transfer the stock of such corporation or banking association, standing in the name of any such decedent, until the tax on the transfer thereof has been paid; and providing penalties; and citing certain acts for repeal.

ARTICLE I.

Imposition and Rate of Tax.

SECTION 1. Be it enacted, &c., That a tax shall be, and is hereby, imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations in the following cases:

(a) When the transfer is by will or by the intestate laws of this Commonwealth from any person dying seized or possessed of the property while a resident of the Commonwealth, whether the property be situated within this Commonwealth or elsewhere" (Record, p. 64).

Section 2 of Article I, which relates to the valuation of the estate without any allowance for taxes imposed by the United States or other states, is as follows:

> "SECTION 2. All taxes imposed by this act shall be at the rate of two per centum upon the clear value of the property subject to such tax passing to or for the use of father, mother, husband, wife, children, lineal descendants born in lawful wedlock, legally adopted children, children of a former husband or wife, or the wife or widow of the son, of a person dying seized or possessed thereof, and also on the clear value of such property passing from the mother of an illegitimate child, or from any person of whom the mother is a lineal descendant, to such child, his wife, or widow, and passing from an illegitimate child to his mother; and at the rate of five per centum upon the clear value of the property subject to such tax passing to or for the use of any other person or persons, bodies corporate or politic; to be paid for the use of the Commonwealth. In ascertaining the clear value of such estates, the only deductions to be allowed from the gross values of such estates shall be the debts of the decedent and the expenses of the administration of such estates, and no deduction whatsoever shall be allowed for or on account of any taxes paid on such estate to the Government of the United States or to any other State or Territory" (Record, p. 65).

Statement of Facts.

Mr. Henry C. Frick died in the City of New York on the 2nd day of December, 1919. He left a last will and testament (Record, p. 44), dated the 24th day of June, 1915, probated on December 6, 1919, in the office of the Register of Wills of Allegheny County and of record in Will Book Volume 160, page 6. This will is in writing. It was subscribed at the end by Mr. Frick in the City of Pittsburgh, Pennsylvania. It was attested by the written signatures of three citizens of Pittsburgh, and was in Pittsburgh at the time of his death. Mr. Frick was born in the State of Pennsylvania and he was continuously domiciled in said State from his birth until his death.

Mr. Frick, at the time of his death, owned a house at Pride's Crossing in the State of Massachusetts. By his will he devised to his wife a life estate in this property and the remainder to his daughter. He bequeathed to his wife all the tangible personal property (furniture, pictures, horses, cows, etc.) located in and about this residence. The taxing authorities of the State of Pennsylvania did not attempt to include the value of this real estate in Mr. Frick's taxable property (although the act requires it to be included), but did include the value of the tangible personal property located there at a valuation of $325,534.25, and levied a transfer inheritance estate tax thereon. This levy has been sustained by the Orphans' Court of Allegheny County, Pennsyl-

vania, and by the Supreme Court of Pennsylvania, the court of last resort.

Mr. Frick also owned another residence, located on Fifth Avenue in the City of New York, the land and buildings being of the value of upwards of $3,000,000. This residence he devised to a charitable corporation of the State of New York known as "The Frick Collection;" but he gave his wife the right or license to use it "so long as she should occupy the same as one of her residences" (Record, p. 51, fol. 144 a). The State of Pennsylvania has not attempted to tax this real estate, although the Act the constitutionality of which petitioners are here attacking, directs such a levy to be made. Contained in this residence was Mr. Frick's collection of paintings, antique furniture and other objects of art. This he bequeathed to said corporation of the State of New York known as "The Frick Collection" (Record, p. 51, fol. 145 a), with the mandatory provision that the collection should always be retained and maintained in said residence for the use and benefit of all persons whomsoever (Record, p. 54, fol. 149 a). This residence also contained certain other furniture, household supplies, etc., which were not a part of the Frick Collection, which Mr. Frick bequeathed to his wife, The State of Pennsylvania valued the articles of personal property comprising "The Frick Collection" at $13,132,391, and valued the rest of the tangible personal property (furniture, etc.) that was in this residence and garage adjacent thereto at $77,818.75. The Commonwealth included these

valuations in its estimate of the taxable value of the estate and levied an inheritance tax thereon. Plaintiffs in error contend that these articles of tangible personal property were beyond the dominion of the State of Pennsylvania, and that the Pennsylvania Act, in so far as it authorized and directed a tax to be levied on them, is a violation of the Constitution of the United States, has the effect of reducing the residuary estate by upwards of $600,000, and deprives the plaintiff in error at 442 and 443 of her property, and deprives all the residuary legatees, including the non-resident charities, who are represented by the executors, the plaintiffs in error, at Nos. 444 and 445 of their property.

The balance of the tax in controversy in this case, amounting to upwards of $500,000, was caused by the refusal of the State of Pennsylvania (in accordance with the mandate of the statute as it was construed by the Orphans' Court of Allegheny County and the Supreme Court of Pennsylvania) to deduct from the total taxable value of the estate before levying the tax four items: (a) estate taxes paid to the United States which were a paramount lien upon the whole estate; (b) transfer inheritance taxes paid to the states and to certain Canadian provinces upon shares of capital stock of corporations organized under the laws of those states and said provinces, which were a paramount lien upon those shares and where the shares could not be reduced to possession by the executors or over which no act of dominion could be exercised by them until such

foreign taxes were paid; (c) transfer inheritance estate taxes paid to other states upon real estate located in those other states; and (d) the inheritance taxes imposed by the State of Pennsylvania upon the general and specific devises, which taxes, so paid, amounted to $1,925,247.61 (which will be increased if this decision of the Supreme Court of Pennsylvania stands by the additional amount of $1,200,000).

The fourth and eighth assignments of error, which cover items (c) and (d) referred to, are withdrawn and no argument is made upon these points because the plaintiffs in error have reached the conclusion that under the construction placed upon the Pennsylvania statute by the Pennsylvania Supreme Court there is no Federal question involved.

The taxes included in items (a) and (b) are, by the law and under the terms of Mr. Frick's will (Record, p. 58; fol. 156 a), thrown upon the residuary estate.

The Pennsylvania inheritance tax act, as construed by the Pennsylvania courts, imposed an estate tax upon the whole property, real and personal, of which the decedent died seized, wherever situate, and allowed deductions to be made only for debts of the decedent and administration expenses. The tax imposed by the act, however, is not uniform, but is classified according to the relationships of the beneficiaries to the deceased (Record, p. 65, fol. 183 a). Under this statute, the bequests to Mr. Frick's wife and his lineal descendants were subject to a two per cent.

tax. All other devises and bequests were subject to a five per cent. tax. The Pennsylvania act contains no exemption for charities. Although Mr. Frick gave about three-fourths of his entire estate to charities, the State of Pennsylvania has taxed all these gifts except real estate outside of the state.

In order to assess the tax at the different rates, a difficult if not impossible thing to accomplish where the tax is levied upon the decedent's whole estate and not upon the gifts to the beneficiaries, the taxing authorities adopted the following method, which the Supreme Court of Pennsylvania by affirming the decision of the Orphans' Court of Allegheny County has sustained.

This is the way they made their levy (Record, p. 3, fol. 5 a). They first took the values of all the real estate in Pennsylvania specifically devised (except the devise to the City of Pittsburgh for a park which was not taxable) and of all the personal property specifically bequeathed, wherever situate, and calculated a tax on them at the rate of either two or five per cent. They then took from the will the amounts of the general legacies and assesed a tax on those at the proper rates. This brought the calculation to a point where they had found the value of the real estate in Pennsylvania and all the other property disposed of by the will, except the residuary estate, to be $55,783,794 (Record, p. 4, fol. 6 a). This it will be understood is the sum of the general and specific bequests and devises (excluding real estate outside of Pennsylvania). They then fixed the value of the entire estate, excluding real estate

outside of Pennsylvania, at $89,675,098.45. From this total valuation they subtracted the sum of the specific devises and bequests and reached a residue of $33,891,304.45. From this residue they deducted the estimated administration expenses and debts of the decedent amounting to $9,187,-177.90, leaving an estimated balance of $24,704,-126.55, which the Orphans' Court of Allegheny County has christened "the net residuary estate" (Record, p. 4, fol. 6 a). The taxing authorities then proceeded to tax thirteen-hundredths of this so-called net residuary estate at two per cent because it is bequeathed to the daughter of the decedent, and eighty-seven-hundredths at five per cent because under the will it goes to various charities. These two sums they added to the tax on the specific and general devises and legacies, which gives an aggregate amount of $3,064,107.85. Deducting $1,978,949.71 previously paid by the executors on account, and adding $103,090.02 interest, they arrived at a total unpaid tax claim of $1,188,248.16 (Record, p. 4, fol. 7 a). This is the amount for which the Orphans' Court of Allegheny County entered judgment. The Supreme Court of Pennsylvania on appeal by the Commonwealth added $100,000 (and interest thereon) to this amount, being a tax of five per cent. on what is known as the Park Endowment Fund of $2,000,000, which the court below had found was not taxable.

The actual net residuary estate is not this fictitious amount of $24,704,126.55 arrived at as shown above. There is no such amount of money in the residuary estate, and the residuary legatees

will never get it. The amount of money actually in the residuary estate is this estimated amount less $6,338,898.68 paid to the United States as Federal estate tax (Record, p. 15, fol. 26 a) less $1,084,459.42 paid to other states and countries as taxes (Record, p. 16, fol. 27 a), less $1,978,949.71 paid to the Commonwealth of Pennsylvania as inheritance taxes (Record, p. 16, fol. 28 a), that is to say, less a total sum of $9,402,307.81. So the actual residuary estate now in the hands of the executors is only $15,301,818.74. Moreover, if this decision of the Supreme Court of Pennsylvania stands, the residuary estate will be still further reduced by about $1,300,000, additional Pennsylvania taxes that will have to be paid; and, if the Commissioner of Internal Revenue is successful in the contention he is making for additional United States estate tax, it will be reduced by the further sum of $3,100,000. This will bring the real value of the residuary estate down to about $10,901,818.74. So that the actual net residuary estate, which it may be assumed the residuary legatees will receive, if it is not still further depleted by taxes, is not twenty-five million dollars, but somewhere between eleven and fifteen million dollars.

POINT I.

IN MEASURING THE TAX ON THE RIGHT OF TRANSMISSION PENNSYLVANIA HAD NO RIGHT TO INCLUDE IN THE CLEAR VALUE OF THE ESTATE, WHICH WAS THE MEASURE OF THE TAX, TANGIBLE ARTICLES OF PERSONAL PROPERTY BELONGING TO MR. FRICK AT THE TIME OF HIS DEATH WHICH HAD AN ACTUAL AND READILY ASCERTAINABLE SITUS IN NEW YORK AND MASSACHUSETTS.

In this case the Supreme Court of Pennsylvania has construed the Pennsylvania statute as an exercise of the state's taxing power. This being so, the act must stand or fall as a tax act. If invalid because the tax is unconstitutional, the statute cannot be saved by an attempt to treat it as an escheat act. This precise point in connection with an earlier inheritance tax statute was decided by the Supreme Court of Pennsylvania in *Cope's Estate,* 191 Pa., p. 1.

In *Union Refrigerator Transit Co. vs. Kentucky,* 199 U. S., 194 (1905), this Court was called upon to decide whether a corporation organized under the laws of Kentucky was subject to taxation upon its tangible personal property permanently located in other states and employed there in the prosecution of its business. The decision was that the tangible personal property so located was not subject to the taxing power of Kentucky, and the taxing statute was adjudged to be a violation of the due process of law clause of the fourteenth amendment.

In the course of the opinion of the Court, the following language occurs (p. 211):

> "It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same state, which are controlled by different considerations."

During the years which have elapsed since this decision, this Court has decided such of the questions covered by the above reservation as concern the taxation of intangible personal property, both through the medium of direct property taxes and through the medium of inheritance or succession taxes. In both instances it has been decided that such taxation is within the power of the state of the domicile.

In that interval, the question presented by the instant case has not come before the Court, and now for the first time the Court must decide whether a state, through the medium of a tax on the right of transmission, can reach tangible personal property definitely and permanently located at the time of the decedant's death in other states and subject to their power of taxation, and so accomplish indirectly what it was adjudged in the Union Transit Company case the State of Kentucky could not do through the medium of a property tax.

It is evident from the cases decided by this court and by courts of last resort in many states

that the distinction between tangible and intangible property is regarded as much more significant than the distinction between so-called property taxes and taxes such as inheritance taxes and other excise taxes measured by the value of property.

There is an obvious distinction between tangible and intangible property. The latter is held secretly; there is seldom or never a method by which its existence or ownership can be ascertained in the state of its situs except perhaps in the case of mortgages or shares of stock.

The arguments in favor of the taxation of intangible property at the domicile have little application to tangible property. The fact that such property is visible, easily found and difficult to conceal and the tax is readily collectible is so cogent an argument for its taxation at its situs that there has been a growing consensus of opinion that it is taxable in the state where it is permanently located and employed and where it receives its entire protection.

Thus in the present case the articles of tangible property in Massachusetts have actually been reached for taxation through the medium of the Massachusetts Inheritance Tax Law. Likewise, in New York succession taxes have been paid in respect of all the tangible personalty situate in that state except The Frick Collection, which, being the subject of a gift to charity, is, under the policy of New York, exempt from the taxation to which it would otherwise have been subject.

On the other hand, the distinction between a tax on property measured by its value and a tax on the transmission of property determined in amount by the value of the property selected as its measure is at best a shadowy one.

When analyzed, a tax on property is seen to be a tax on the thing called ownership, which is merely a person's legally protected interest in the thing owned. A tax on transmission is a tax on the substitution of one person for another in respect of the relation between the person and the thing. While the distinction is entirely thinkable there is no really sound or substantial reason for reaching in the one case a result different from that reached in the other. In other words, there is no good reason in fairness, justice, or even in convenience, for sustaining a tax measured by the value of property in the one case where on precisely the same set of objective facts it has been decided in the other that the attempt of the state is void as amounting to confiscation.

Discussion of decisions of this court on the taxation of tangible and intangible personal property.

In the *Union Transit case* (*supra*) the tangible personal property in question consisted of cars rented to shippers who took possession of them from time to time at points outside the taxing state and used them for the carriage of freight in the United States, Canada and Mexico. The owner contended that the power of Kentucky to tax these cars was limited to the number

of cars which, under a system of averages upon their gross earnings, could be shown to have been used within the limits of the taxing state. The Court of Appeals of Kentucky, however, found that the Company was liable to taxation, not upon the few cars determined by this system of averages, but upon the entire number of two thousand cars irrespective of their actual situs. It was this decision which was reversed by this court on the ground that it involved a violation of the guarantees of due process under the Fourteenth Amendment.

If the question presented to this court in that case had been presented upon a record in which the State of Kentucky had attempted to tax treasures of art and other objects of personalty located in New York and Massachusetts and belonging to a citizen of Kentucky, it is clear that the tax would similarly have been adjudged invalid. The question, therefore, narrows itself to this: whether the State of Kentucky, by awaiting the death of the owner and imposing a transmission tax measured in terms of the value of those same articles of property, could successfully have reached them for taxation after the accident of death, in spite of the presence of every objection based upon unfairness, injustice, inconvenience and lack of power which had compelled a declaration of the invalidity of the tax when imposed during his lifetime.

Both before and after the decision in the *Union Transit case* are many decisions of this court in which decisive emphasis was laid upon

the distinction between tangible and intangible property, and where the nature of the tax as being a tax on property or merely a tax measured by the value of property was immaterial.

In *Pullman's Palace Car Co. vs. Penna.*, 141 U. S., 18, the tax on cars was upheld only because a method of calculation was resorted to which resulted in limiting the tax to cars inside the state and prevented it from affecting those beyond its limits. This was the case of a state tax on capital stock which happened to have been regarded by the Supreme Court of Pennsylvania as a property tax, but which elsewhere has been regarded as a franchise tax.

In *Delaware Lackawanna & Western R. R. Co. vs. Penna.*, 198 U. S., 341, it was held that the Pennsylvania capital stock tax could not include in the valuation for tax purposes real estate out of the State or tangible personal property (coal) which was stored outside the State.

In *Union Transit Co. vs. Kentucky* (*supra*) this court used as a relevant decision *Weaver's Estate vs. State,* 110 Iowa, 328, where it was held that a herd of cattle within the State of Missouri belonging to a resident of Iowa was not subject to the taxing power of Iowa, although the device resorted to by Iowa for reaching the cattle by taxation was an inheritance tax measured by the value of the owner's estate. It will be noted that this decision, thus cited with approval by this court, is not only in direct opposition to the decision of the Supreme Court of Pennsylvania

here assigned as error, but it was rendered in a case in which the Iowa executors had actually converted the Missouri cattle into money and had brought the fund into the Iowa Court for accounting and distribution. In the instant case The Frick Collection will not be, and cannot be, sold, and the Collection itself can never find its way into Pennsylvania.

In *New York Central R. R. vs. Miller*, 202 U. S., 584, although the tax was confessedly a franchise tax measured by the value of the company's property, the decision sustaining the validity of the tax, so far as it related to rolling stock which wandered in and out of the state, was rested upon the failure of the company to prove that the cars remained away for such a length of time as to acquire a situs elsewhere and upon the absence of satisfactory evidence upon which to base an apportionment.

In *Southern Pacific Railroad Company vs. Kentucky*, 222 U. S., 63, which was a tax on the property of the Southern Pacific Railroad imposed by the State of Kentucky, its domicile, it was held that Kentucky could not include in the valuation tangible personal property (tug boats and barges) which had acquired a local situs in other states, but that they could include the steamships which had never been in, and never could be brought into Kentucky, because they wandered around the world on the high seas, and had never acquired any situs in any other state.

In *Fidelity and Columbia Trust Co. vs. Louisville*, 245 U. S., 54, consistently with the

distinction under consideration, it was held that Kentucky could impose upon a person domiciled in Kentucky a tax measured in part by money owed to him by his bank of deposit in Missouri.

In *Bullen vs. Wisconsin,* 240 U. S., 625, decedent died domiciled in Wisconsin, leaving corporate bonds in a safe deposit box in Illinois. The State of Wisconsin levied an inheritance tax and included the deposited bonds in the estate which was the measure of the tax. Consistently with the distinction between tangible and intangible personalty, the domiciliary state had a clear right to do this. It was sought by counsel for the executors to impeach the right of the domiciliary state by proof of the circumstance that the deposited bonds had been taxed in Illinois. Since double taxation by different sovereignties is not in itself a ground of invalidity, but merely a circumstance to be taken into consideration in determining the question of due process, the Court held that the mere fact that the bonds had been taxed in the state of deposit could not displace the right of the domiciliary state to include them in the measure of the inheritance tax.

In *Wallace vs. Hines,* 253 U. S., 66, it was held that a special excise tax (p. 68), which was arrived at by apportioning the mileage of tracks within the State of North Dakota to the mileage of tracks everywhere, was unfair and invalid where the railroad company proved that the miles of track outside the state were of very much greater value than the miles of track within the state. The railroads involved were North-

ern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee & St. Paul Railway Company, Minneapolis, St. Paul & Saulte Sainte Marie Railway Company and Montana Eastern Railway Company.

It will be observed that this was the case of an excise tax, not a tax upon property. The measure of the tax was property, but was not for the most part personalty. The case is cited for the purpose of showing the scrupulous care used by the Court to limit both property taxes and excise taxes to property within the taxing state. As in the case of the Pullman cars, so in the case of track mileage, the tax is upheld if the apportionment of property within and without the state is fair; and is adjudged invalid if, as in the Hines case, the method of calculation is unfair.

In all cases cited above, except *Pullman Palace Car Co. vs. Pa.*, 141 U. S., 18, and *Wallace vs. Hines*, 253 U. S., 66, the tax act which was under review was an act passed by the State of the domicile and was either a tax on the ownership of property or a tax on the use or transmission of property. In every case in which the property was intangible personalty the tax was upheld. In every case in which tangible personalty with a situs outside the domiciliary state was either sought to be taxed or to be included in the measure of the tax, the tax was adjudged invalid. The *Pullman car case* and the case of *New York Central Railroad vs. Miller*, 202 U. S., 594, are not exceptions to this statement. In neither case was the taxing act an act passed by the state of

which the company was a citizen. In the former, the tax was upheld because the method of determining what proportion of cars might fairly be treated as cars operating within the taxing state was deemed reasonable and just. In the latter case, which involved rolling stock that wandered in and out of the state, there was insufficient evidence for making such an allotment and a failure to prove that any of the cars had acquired a situs anywhere else.

The limited power of each one of the United States to reach by taxation tangible personalty physically beyond its boundaries is in marked contrast with the plenary power of the United States to use its jurisdiction over its domiciled citizens as a basis for taxing their tangible personalty wherever it may be. The due process clause in the fifth amendment to the Constitution is the only restraint upon the United States in this respect, and a much more limited scope has been accorded to it by this Court than to the due process clause in the fourteenth amendment, which constitutes a wholesome restraint upon the several states. This clearly appears from the decision of this Court in *United States vs. Bennett,* 232 U. S., 299, which was the case of a Federal tax on the use of foreign-built yachts owned by citizens of the United States who were domiciled therein. The opinion of the late Chief Justice at p. 306 is a lucid statement of this important discrimination between "due process" in the fifth amendment and the same words in the fourteenth amendment.

We turn now to a brief survey of the decisions of this Court respecting taxation of tangible and intangible personalty where the taxing state was not the state of the domicile of the owner.

In *Blackstone vs. Miller,* 188 U. S., 189, the decedent was domiciled in Illinois, but at the time of his death had a deposit account with a bank in New York. It was held that New York could include the deposit in measuring its inheritance tax. The basis of this decision is that a tax on the transmission of a debt may properly be laid by the state that has jurisdiction of the debtor, because it is only under its laws that the collection of the debt can effectively be enforced; and this decision is consistent with the right of the state of the domicile of the creditor to include the credit in the inheritance tax levied by it, upon the general principle applicable to all intangible personalty.

In *Wheeler vs. New York,* 233 U. S., 434, promissory notes owned by non-residents of New York were contained in a safe deposit box in that state. It was held that New York could include the value of these notes in assessing the inheritance tax payable by the estate of the deceased owner. Since in this case not only the payee of the note, but also the maker, was a non-resident, the decision is a recognition of the right of a state other than the state of the domicile to tax the transmission of intangible personalty where access to the evidences of debt can be obtained in New York only in virtue of an authority conferred by the New York laws.

It will be observed that the right of New York to reach the promissory notes for purposes of taxation is similar to the right exercised by Illinois in *Bullen vs. Wisconsin, supra,* to tax bonds on deposit in Illinois but owned by one who died in Wisconsin.

In *Maxwell vs. Bugbee,* 250 U. S., 525, this Court passed upon a method adopted by the State of New Jersey for determining for the purposes of its inheritance tax the value of property within the state, both real and personal, belonging to a decedent who died domiciled in another state. The question was similar to the question discussed in the *Pullman Car case,* in *New York Central Railroad vs. Miller,* and in *Wallace vs. Hines;* that is to say, the case depended upon the inherent reasonableness of the method of determining what portion of the property might fairly be regarded as within the limits of the taxing state. The majority of the Court were of opinion that the method adopted by the state was fair, but from this decision four Justices dissented.

In all of the cases so far discussed, the major emphasis was laid by the Court upon the nature of the property, as being either tangible or intangible and, if tangible, upon the situs of the property, as being either within or without the taxing state.

Where a right is conferred by another state, its value cannot be included in the valuation for tax purposes.

In many of these cases there is more or less reference to one of the basic principles of taxa-

tion, which is that the citizen enjoys a protection of person and property, which is a reciprocal of the power of the sovereign to tax him.

It is of course not possible to test the validity of a tax act by asserting a specific relation between the amount or nature of the tax and the degree of protection afforded. Where a right which is the subject of tax cannot possibly have been conferred by the taxing state, but exists because of the act of another sovereignty, the value of the right in question may not lawfully be included in a tax laid by the taxing state.

The leading case for this proposition is *Louisville Ferry Co. vs. Kentucky,* 188 U. S., 385, in which it was held that Kentucky in levying a franchise tax on a Kentucky corporation could not lawfully include in the valuation of the franchise a ferry right given to the corporation by the State of Indiana, in virtue of which ferry right, jointly with the franchise granted by Kentucky, the corporation operated its ferry across the Ohio River.

Similarly it has been held that a state in subjecting a foreign corporation to an excise tax measured in terms of the authorized capital and surplus of the corporation must observe reasonable regard for the proportion of capital actually used for business purposes within the taxing state. Accordingly, where in *Baltic Mining Co. vs. Massachusetts,* 231 U. S., 68, a tax of this sort was levied but was subject to an upward limit of two thousand dollars, this Court held that the state had not violated the due process clause. On

the other hand, where in *Looney vs. Crane Company*, 245 U. S., 178, it appeared from the record that the proportion of capital actually employed by the corporation in doing business in the taxing state was very small, where the graduated tax was measured by the entire capital stock and surplus without a maximum limit, and where the sum actually sought to be collected from the corporation would have been $17,040, this Court held that the fourteenth amendment had been violated, inasmuch as this was in effect an attempt to exercise taxing power over property and rights wholly beyond the jurisdiction of the state.

The theory upon which the Commonwealth of Pennsylvania attempts to sustain the tax in the instant case.

In the light of the foregoing decisions and of the principles which underlie them, we assert that the State of Pennsylvania violated the due process clause of the fourteenth amendment when it undertook to include in the measure of a tax on transmission, tangible personal property with a situs in New York and Massachusetts which it could not have subjected to taxation by resorting to a property tax. The defendant in error, however, seeks to justify the act in question upon a variety of grounds.

One of these grounds is stated in the majority opinion, page 98 of the Record (end of fol. 241 and beginning of fol. 242), where the court seeks to some extent to justify its decision upon the proposition that inasmuch as the property which is being distributed in this proceding is all in Penn-

sylvania and the decedent was a citizen of Pennsylvania, and, as the opinion says, the appellants are citizens of Pennsylvania, the tax can be sustained upon the ground that the Pennsylvania courts have jurisdiction of the person as well as of the property. The court evidently overlooked the fact that while one of the residuary legatees, Miss Frick, the plaintiff in error in two of the cases before the court, is a citizen of Pennsylvania, other residuary legatees represented by the executors, who are their proper representatives in Pennsylvania and in this court (see Chief Justice Gibson's opinion in *Koch's Estate,* 4 Rawle, 268), are not citizens or residents of Pennsylvania. In Article VII of his will (Record 56, fols. 154 and 155) Mr. Frick bequeathed of his residuary estate, to Princeton University 30 per cent., to Harvard College 10 per cent., to Massachusetts Institute of Technology 10 per cent., to the Society of the Lying In Hospital of the City of New York 3 per cent. Thus altogether 53 per cent. of the residuary estate went to citizens of New Jersey, New York and Massachusetts. Consequently, it is not a fact, as the court assumes, that Pennsylvania has jurisdiction over the person as well as of the property.

We believe that if any justification is possible, it must be founded either (a) upon the fiction expressed by the words *mobilia sequuntur personam*; or (b) upon the proposition that the succession to decedent's tangible property outside of the State passes by virtue of the laws of the State of the domicile, and that therefore

both the State of domicile and the State of the *situs* can tax; or (c) that because there is money being distributed by the Pennsylvania courts to beneficiaries who must come into Pennsylvania to get their share in the distribution, the State of Pennsylvania can impose a tax upon the property in Pennsylvania and determine the amount of the tax by adding to the value of the taxable property within the State the value of the non-taxable property without the State.

The tax in the instant case does not involve an estate tax upon Mr. Frick's real estate located in other places than Pennsylvania, although Mr. Frick had millions of dollars' worth of real estate elsewhere, and although the mandate of the statute is just as explicit with respect to real estate as it is with respect to personalty, the language being "the transfer of any property, real or personal, * * * whether the property be situated within this Commonwealth or elsewhere" (Record, bottom of p. 64 and top of p. 65, folio 182 a). This omission to impose a tax on the foreign realty is made presumably because the mandate of the statute, so far as it relates to foreign real estate, was so clearly a violation of the due process clause that the State has never attempted to enforce it. We submit that it is just as much beyond the jurisdiction of the State of Pennsylvania to levy a tax upon the transfer of tangible personal property which has an actual situs elsewhere as upon real estate whose situs is elsewhere.

The right to impose a transfer tax upon personal property must necessarily be based upon

the same jurisdictional fact as the taxation of the transfer of real estate. We submit that it is the law that, while the transfer of intangible personalty can be taxed at the domicile of the owner, either *inter vivos* or upon death, that is true only because of the fiction *mobilia sequuntur personam.*

Originally this theory applied to tangibles as well as to intangibles, but it has long since passed away as to anything except intangibles. This, because fiction must yield to fact.

These tangible articles, pictures, furniture, household stores, cows, horses, agricultural implements, have a real, physical existence and necessarily have a situs as surely as buildings and lands have. Their situs is in New York and Massachusetts, not in Pennsylvania. Therefore, this tax cannot be sustained upon authority of the maxim *mobilia sequuntur personam,* either under the decisions of this Court or under the decisions of the Supreme Court of Pennsylvania:

Eidman vs. Martinez, 184 U. S., 578, at pp. 581-582;

Union Refrigerator Transit Co. vs. Kentucky, 199 U. S., 194, at p. 206;

Metropolitan Life Insurance Co. vs. New Orleans, 205 U. S., 395, at p. 402;

Commonwealth vs. Delaware, Lackawanna & Western R. R., 145 Pa., 96, at p. 103;

Commonwealth vs. American Dredging Co., 122 Pa., 386;

Hostetter's Estate, 267 Pa., 193.

This proposition is so clear that no attempt was made in the Supreme Court of Pennsylvania to sustain the tax upon the foreign tangibles by reference to the maxim. On the contrary, the Commonwealth of Pennsylvania stated in its brief filed in that court (bottom p. 18 and top of p. 19):

> "Thus far no reference has been made to the maxim '*mobilia sequuntur personam.*' Such reference has been purposely omitted because it was not desired to base this argument upon fiction, but upon fact."

The Supreme Court of Pennsylvania, in its opinion by Mr. Justice Simpson (Record, p. 93, fol. 232), does not even mention the maxim or in any way refer to it as constituting any authority for the levying of this tax.

The proposition that was contended for by the Commonwealth of Pennsylvania is that the taxing power can be sustained because "it is the law of Pennsylvania which determines the validity of the will of Mr. Frick and of the dispositions of certain property therein made. The law of Pennsylvania, and not the law of Massachusetts or New York determines how the tangible personalty shall be transferred and whether it shall be transferred at all. Since the law of Pennsylvania governs, that law may condition the transfer in such method, either by way of inheritance tax or otherwise, as the Legislature sees fit."

This argument, we submit, is fundamentally unsound because such is not the fact. The valid-

ity of Mr. Frick's will in Massachusetts and in New York and the question whether the specific bequest, for example, of this tangible personal property, worth upwards of thirteen million dollars, to The Frick Collection, a citizen of the State of New York, is valid or not depend upon the common law and statutes of the States of Massachusetts and New York, not in any degree upon the laws of the State of Pennsylvania. when one reads carefully the decision of the Supreme Court of Pennsylvania as expressed by Mr. Justice Simpson it will be observed that the State of Pennsylvania did not base its decision upon the proposition we are now discussing. It is only in connection with the third proposition that the Supreme Court of Pennsylvania refers to this proposition at all; and then the court refers to it as a sort of make-weight in support of the third proposition.

The third proposition is that, since there was property in Pennsylvania which did pass and which was undoubtedly subject to its jurisdiction, the State of Pennsylvania could impose such conditions as it pleased upon the transfer of that property; that when the residuary legatees came into Pennsylvania to get their share in the residuary estate which was in the hands of the Pennsylvania executors, the State of Pennsylvania could say to them: "You shall take only what we see fit to allow you to take, and what you can take is only that which is left after we have deducted an *ad valorem* tax upon the value of all the property, adding to the value of the property

within our jurisdiction the value of all real estate and all tangible personal assets located without our jurisdiction."

We have stated the proposition as above, (although in the instant case there was no attempt to add the value of the foreign real estate) because the statute requires the adding of the value of the real estate and because the principle asserted by the Pennsylvania Supreme Court is just as applicable to real estate outside of the state as it is to tangible chattels outside of the state.

We submit that the levying of a capital tax, an *ad valorem* tax, a transfer tax, based upon any such theory and actually producing such a result, is unjust, is confiscatory, is a violation of due process of law as expressed in every charter upon which English-speaking people have relied from the Great Charter of 1215 to the fourteenth amendment of the Constitution of the United States. The establishment of such a proposition would mean the overturning of the whole theory of taxation. It would mean that if a citizen of Pennsylvania dies leaving twenty millions of dollars, of which one million is in Pennsylvania and nineteen millions elsewhere, the State of Pennsylvania can levy a five per cent. tax (its taxes must be uniform) on the transfer of property in Pennsylvania, but in ascertaining the value of the million dollars' worth in Pennsylvania it can add to it the nineteen million dollars which is elsewhere and tax the whole, so that the five per cent tax on that million dollars is not fifty thousand dollars, but is one million dollars; that the State of Penn-

sylvania can take the whole one hundred per cent of the Pennsylvania assets and call it a five per cent. tax. Such a proposition is preposterous. Once establish that proposition and you have no boundary at all to confiscation. Why? Because you are levying an *ad valorem* tax and basing the tax upon something else than the value of that which is taxed. Any such theory of taxation is directly in the teeth of the decisions which we have cited on pages 35 to 38 of this brief.

At the decedent's death these tangible articles of personal property passed by virtue of the laws of Massachusetts and New York, not of Pennsylvania.

Recurring then to the real question in this case, is it a fact that the succession to these tangible articles of personal property located in New York and Massachusetts passed by virtue of the laws of Pennsylvania, not by virtue of the laws of New York and Massachusetts?

Tangible personal property is subject to the dominion of the sovereignty where it is situated. The question who is to be recognized as its owner during the life of the owner is a question solely for the sovereignty where the property is located. To whom the title passes when its owner dies is determined by the law of that sovereignty alone, and does not depend in any degree whatsoever upon the law of any other sovereignty.

The question in this case is the validity of Mr. Frick's will in New York and Massachusetts. Is his will valid under the laws of those states?

There must be a compliance with the laws of those states before the will will pass title to tangible property in those states.

Coming then particularly to the question of what happens to Mr. Frick's tangible property in New York and Massachusetts when he dies, What will be done with it? Take first these tangibles which by Mr. Frick's will are bequeathed specifically to a New York corporation, a citizen of the State of New York. Will any one deny the proposition that whether this citizen of New York gets these chattels depends first upon the question, Is Mr. Frick's will valid under the laws of the State of New York? and in the second place, if the legatee has difficulty in getting them, will it not be the Surrogate of the City of New York that will make the order that enables him to get them, rather than the Register of Wills or the Orphans' Court of Allegheny County, Pennsylvania? When you have answered these two questions, you have decided this case.

It is horn-book law that the Pennsylvania executor or administrator can do nothing in New York or Massachusetts under any authority derived from the State of Pennsylvania. Why? Because the jurisdiction of Pennsylvania ends at the state line. There are many things which the states of New York and Massachusetts—the Surrogate of New York and the Probate Court of Essex County—may do in aid of the principal administration in Pennsylvania; but what they do they do because of the laws of New York and Massachusetts, not because of anything in the

laws of Pennsylvania—but nowhere, at any time, in any English-speaking country did the sovereignty of an ancillary administration where the tangible chattel was situated which was specifically bequeathed to a citizen of that sovereignty send the thing "home" to the state of the principal administration and make its own citizen go there to get it.

In *Harvey vs. Richards,* 1 Mason, 381, Mr. Justice Story states the rule in such cases—the common law of the United States. So Mr. Justice Holmes says in *Blackstone vs. Miller,* 188 U. S., 189, at p. 204:

> "Ancillary administrators pay the local debts before turning over the residue to be distributed, or distributing it themselves, according to the rules of the domicile. The title of the principal administrator or of a foreign assignee in bankruptcy, another type of universal succession, is admitted in but a limited way or not at all."

The law of England is the same.

In re Lorillard, Griffiths vs. Catforth (1922, 2 Ch., 638), Lord Justice Warrington said:

> "The persons entitled to the unadministered residue are in this country, and the Court will not order these moneys to be sent to an administrator abroad."

So at common law we see that it is merely a matter of comity; that is, it is a question for the common law of New York and Massachusetts

how far they will recognize the laws of Pennsylvania as to the validity of a Pennsylvania will and of the succession to property located in New York and Massachusetts, and that in so far as they do recognize it, they do so because such is the common law of New York and Massachusetts, not because it is the common law of Pennsylvania. We differ entirely from Mr. Justice Simpson of the Supreme Court of Pennsylvania, where he says (Record, near bottom of p. 102, that it is merely metaphysics to argue whether the transfer is effected by the law of the situs or the law of the domicile. The question is, which law is effective to make a valid transfer in New York and Massachusetts?

Obviously if New York and Massachusetts have legislated as to what foreign wills are valid to pass title to property in those states, it is their statutes, not the statutes of Pennsylvania, which are effective in New York and Massachusetts.

We shall first take Massachusetts. We notice first that the laws of Massachusetts make no distinction as to the validity of foreign wills, depending on whether they pass real estate or personal property. We notice further that a will of a nonresident is valid in Massachusetts if it is executed in accordance with the laws of Massachusetts *or* in the mode prescribed by the law either of the place where the will is executed *or* of the testator's domicile, *provided* that in those last cases it is in writing and subscribed by the testator (Record, p. 88, folio 224 a). There are many other provisions in the Laws of Massachusetts intro-

duced in evidence in this case and printed in the Record beginning on top of page 86 and ending at bottom of page 90, which may be read with interest and profit; but this one thing we have referred to is all sufficient. Is Mr. Frick's will valid in Massachusetts? Will Mrs. Frick get these specific articles which are located in Massachusetts and are bequeathed to her by that will? The will is in writing; it is subscribed at the end; it has three subscribing witnesses; it has been admitted to probate in Massachusetts, and letters ancillary have been issued there. Why was it admitted to probate in Massachusetts? Because (1) it is a perfectly valid will under the laws of the State of Massachusetts; (2) it was executed in the mode prescribed by the law of the place where the will was made (Pennsylvania) and therefore it is a good will in Massachusetts; (3) it was executed in the mode prescribed by the law of Mr. Frick's domicile (Pennsylvania) and therefore is a good will. Measured by all three tests prescribed by the Massachusetts law, it is a valid will, competent to pass title to property, real and personal, in Massachusetts. If Mrs. Frick has any trouble in getting these tangible articles, these pictures, this furniture, these horses, cows and agricultural implements, to whom will she go to get them? Infallibly to the courts of the State of Massachusetts. The courts of Pennsylvania can give her no relief.

Moreover, it will be noted that, even though the will complied with another law than the law of Massachusetts in every particular, nevertheless

the courts of Massachusetts, under the statute of that state, would be powerless to give it any effect if it were not in writing and subscribed by the testator. This is a most important exception rendering ineffective in Massachusetts all foreign nuncupative wills; and it forcefully brings out the fact that the control of the title to Mr. Frick's chattels in Massachusetts was retained by that state.

Let us look now at the statutes of New York.

(1) The validity of a will in New York disposing of real property is regulated by the laws of the State of New York, without regard to the residence of a decedent (Record in this case, p. 75, folio 201 a). The New York real estate passed because Mr. Frick's will was a good New York will.

As to personal property:

> "Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state * * * are regulated by the laws of the state or country in which the decedent was a resident at the time of his death." (Record, p. 75, folio 201 a).

So that if Mr. Frick's will does not otherwise run counter to the laws of the State of New York, it is a valid New York will disposing of personal property, to wit, the objects of art constituting The Frick Collection and the other tangible ar-

ticles situated in New York, if it is executed in the way that the laws of Pennsylvania, his domicile, require of such wills.

Here again it is a valid will in New York, not by virtue of the extraterritorial effect of the laws of Pennsylvania, but because the laws of the State of New York say that a will so executed is valid in New York.

If one should have any further doubt about the proposition, let us see what the exceptions are. The Pennsylvania will, if we may use that expression, is only good to pass tangible articles of personal property in New York, if it does not run counter to any other provision of New York law. We see that there must be ancillary administration in New York (Record, p. 79, folio 207 a), or its equivalent (Record p. 78, folio 206 a). We see that there must be an accounting in New York (Record p. 79, folio 207 a, 208 a); and a great many other things are required by the New York statutes which are in evidence in this case, begining at Record p. 75, folio 201 a and ending at bottom of p. 85, folio 219 a.

Above and beyond all these things, while Mr. Frick's will is valid in Pennsylvania, we see that it is not valid in New York. Why is it not valid in New York? Because under the laws of New York no person having a husband, wife, child or parent shall by will give to any benevolent or charitable association more than one-half part of his estate (Record p. 78, folio

206 a). Mr. Frick did leave a widow and children; he did leave more than one-half his estate to charities (Record p. 40, folios 120 a, 121 a). The Supreme Court of Pennsylvania disposes of this by saying that these provisions of the New York statute "relate, however, only to wills of testators there (in New York) domiciled." (Record p. 102, folio 249 a).

The Court of Appeals of the State of New York has decided just exactly the contrary, to wit, that if the bequest to charities made by the will of a citizen of New Jersey exceed more than one-half of the net value of his entire estate, real and personal, the charitable bequest as to all the property located in New York is void and the property goes to the heirs: *Decker vs. Vreeland,* 220 N. Y., 326.

Are the validity, the effect and the meaning of this New York statute, and the question whether or not a will which conflicts with its provisions can pass title to tangible articles in New York, to be governed by the decision of the Court of Appeals of New York or by the Supreme Court of Pennsylvania? Who can doubt the answer?

Indubitably it is the law of New York that is going to decide who owns this Frick collection; and on the particular point we have been discussing, should the question ever arise, it will decide that Mr. Frick's will was valid in spite of its violation of the New York statute because his widow and children saw fit to ratify the bequest

after his death; and this is so because that is the law of the State of New York. *Amherst College vs. Ritch,* 151 N. Y., 282.

Again, the final judicial authority in the State of New York has decided that the State of the domicile has no authority to impose a transfer succession tax on personal property in the State of New York. *State of Colorado vs. Harbeck,* 232 N. Y., 71, decided November 22, 1921.

Assume then for the purpose of argument that the State of Pennsylvania cannot tax the transfer of these tangible articles of personal property which were located in New York at the time of Mr. Frick's death, either because of the maxim *mobilia sequuntur personam,* or because of the like fiction that succession to them follows the law of the domicile:

(One is tempted to insert parenthetically in this connection Mr. Justice Holmes' language in *Blackstone vs. Miller,* 188 U. S., 189, on p. 205: "according to the fiction that in successions after death *mobilia sequuntur personam* and domicile governs the whole", and again on p. 206, where he is speaking of a distinction as to the power to impose a succession tax on debts on the one hand and tangible chattels on the other, he says: "The maxim *mobilia sequuntur personam* has no more truth in the one case than in the other", and Mr. Justice Fields' language in *Pennoyer vs. Neff,* 95 U. S., 714, at p. 722: "and so it is laid down by jurists as an elementary principle that the laws of one state have no operation outside of its

territory, except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decision. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity and incapable of binding such persons or property in any other tribunals.' ")

What now becomes of the Commonwealth of Pennsylvania's last ditch, namely, that, even if it cannot lawfully levy a transfer inheritance tax upon tangible articles of personal property outside the state, it can levy a transfer inheritance tax upon property within the state and add to the value of that property the value of the property without the state and tax the whole?

Let us try to think clearly about this.

It is not, in the first place, what the Pennsylvania act undertakes on its face to do. The provision of the act itself is so clear as to require no construction, and we do not understand that the Supreme Court of Pennsylvania has construed it to mean anything else than what it says, to wit, that it is a tax "upon the transfer of property", (Record, p. 64, folio 182 a); and that when the transfer is by will from any person dying seized or possessed of the property while a resident of the Commonwealth, whether the property be situate within the Commonwealth or elsewhere (Record top of p. 65, folio 182 a), the tax imposed shall be at the rate of two per centum upon the clear value of the property passing to the father, mother, etc.

and at the rate of five per centum on the property passing to any other person.

It seems to us that the Supreme Court of Pennsylvania took rather a giddy leap when it proceeded to say that, while this act explicitly imposes a tax upon property outside the state, which it cannot do consistently with the Fourteenth Amendment, the act, nevertheless accomplishes the same result indirectly, by adding the value of the property outside the state, which is non-taxable, to the value of the property within the state, which is taxable, and imposing a *transfer tax* measured by the whole. If Pennsylvania can do this with reference to tangibles outside of the state, New York and Massachusetts can do the same thing. They can say that the tangibles which are in their state and within their taxing powers may be valued, for tax purposes, not at their actual value, but at the value of all Mr. Frick's estate everywhere.

But obviously the foreign States cannot do this. Moreover, the answer to the reasoning of the court below, is two-fold.

(1) The legislature of the State of Pennsylvania manifestly never intended to do any such thing and never authorized it. Its tax according to the plain language used was a tax imposed upon the transfer of property outside of the state.

(2) But be this as it may, we submit with confidence that no court in Christendom ever

sustained any such proposition. Such a thing is not due process of law. The late Chief Justice White in his celebrated opinion in *Knowlton vs. Moore,* 178 U. S., 41, says on page 76:

> "In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount."

and again (p. 77):

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

What Pennsylvania is attempting cannot be done without violating the fourteenth amendment, because it is doing just exactly what this Court said in *Maxwell vs. Bugbee,* 250 U. S., 525,

a state cannot do. It is a curious thing that the Supreme Court of Pennsylvania cites *Maxwell vs. Bugbee* as authority for its proposition.

It is apparent that the Supreme Court of Pennsylvania misapprehended the case this Court had before it and the meaning of the language used in the opinion. In *Maxwell vs. Bugbee* the question raised was as to an inheritance tax upon the estate of a non-resident. The tax was levied with respect only to the local real and tangible personal property in the State of New Jersey and with respect to stock of New Jersey corporations and National Banks located in the State of New Jersey. The provision of the state tax law which was in question is the provision requiring the tax levied to bear the same ratio to the entire tax that would be imposed under the act if the decedent were a resident and all his property were located within the state as his property within the state bears to the entire estate, wherever situated, specific devises or bequests of property within the state being excluded from the computation.

The complaint of plaintiff in that case was that the act inflicted an unequal tax, which bore more heavily on the estates of non-residents than on the estates of residents. When one reads Mr. Justice Day's opinion in connection with his references to authorities, it becomes clear that the case does not support the proposition for which it is cited by the Pennsylvania Supreme Court, but on the contrary is directly antagonistic.

Thus, Justice Day says, p. 539:

> "In the present case the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish."

The instant case violates Mr. Justice Day's rule. It involves the proposition that the state of the domicile may add to that which is within its jurisdiction the value of that which is beyond its jurisdiction and then tax the whole. The Pennsylvania Act does "really make the tax one upon property beyond its jurisdiction."

In conclusion, let us turn to the cases upon the precise point.

(1) There is no case in which the point was decided by this Court or any other Federal court.

The only case in which there is any specific dictum of a Justice of this Court is *Keeney vs. New York*, 222 U. S., 525, where Mr. Justice Lamar says (p. 537):

> "The real estate and tangible property in Texas were not within the taxing jurisdiction of the State of New York and there was no effort to tax the transfer of that property."

(2) The decisions of the State courts are conflicting.

In *Weaver's Estate,* 110 Iowa, 328, it was held that an inheritance tax could not be imposed by the State of Iowa upon a herd of cattle which was in Missouri.

In *State vs. Brevard,* 62 N. C., 141, the testator was domiciled in North Carolina, but owned property consisting of realty and personalty in Alabama. Among his property in Alabama was The Vesuvius Furnace, which included not only the real estate, but tangible personal property about the furnace and a number of negro slaves that were bequeathed with the furnace. It was held that this tangible property could not be taxed for inheritance tax purposes in North Carolina, the state of the domicile. The decision is based upon the reasoning in the very exhaustive opinion of the Court in the earlier case of *Alvany vs. Powell,* 55 N. C., 51.

The same principle is laid down in *Joyslin's Estate,* 76 Vermont, 88.

The only case cited by the State of Pennsylvania in the Supreme Court of Pennsylvania in which a court of last resort has decided that a state may levy an inheritance tax upon tangible articles outside its boundary is *Matter of Estate of Swift,* 137 N. Y., 77. This is a very curious case, for the only opinion filed is an opinion written by Mr. Justice Gray to sustain the proposition that the tax was *invalid.* But he says at the end of his opinion that his brethern do not agree

with him and that, therefore, the decision of the court below is affirmed. The case is of very little authority. All we know about it is that the Judges of the Court of Appeals of the State of New York decided that the tax was valid but gave no reason for their decision; while the only opinion filed does demonstrate quite conclusively that such articles cannot be taxed.

It should also be borne in mind that this case was decided before the clear line had been drawn by this court between tangibles and intangibles in the *Union Refrigerator Transit Company Case* and subsequent decisions. The decision was due to the failure of New York to recognize this principle, which must now be regarded as established.

While it was claimed by the counsel of defendant in error in their brief before the Supreme Court of Pennsylvania that there were two other cases (*Carpenter vs. Pennsylvania,* 17 Howard, 456, and *Hartman's Estate,* 70 N. J. Eq., 664), in which state inheritance taxes upon tangible chattels located outside of the state had been sustained by the courts, an examination of the cases themselves shows that they do not support the contention.

In the report of the case of *Carpenter vs. Pennsylvania,* 17 Howard, 456, the only reference to what the personal property was is a statement of Mr. Justice Campbell, made in delivering the opinion of this court, on page 461, which is as follows:

> "In that settlement, the executor represented that a portion of the estate, consisting of securities, stocks, loans, and evidences of debt and property, was not within the commonwealth * * *."

There surely is nothing here to show that any of the property involved was *tangible* personal property. The case was an appeal from the Pennsylvania Supreme Court in *Short's Estate,* 16 Pa. St. Reports, 63. The statement of facts in the report of that case on page 63 states explicitly that decedent "owned a large amount invested in stock and corporations in other states, some bonds of the State of Kentucky, etc., in all exceeding half a million of dollars, and above $1000 of cash in a bank in New York." This certainly discloses no *tangible* chattels located outside of the state. The case is therefore not authoritative for the point on which it is cited; particularly in view of the fact that there is not even any discussion in the opinion of either the Supreme Court of Pennsylvania or the Supreme Court of the United States with reference to the point involved in the instant case.

In *Hartman's Estate,* 70 N. J. Eq., 664, the only point discussed or involved in the decision was whether Mrs. Hartman was a citizen of New York or New Jersey. It was held that she was a citizen of New Jersey, and that therefore New Jersey could tax on the theory of that being her domicile. There is nothing in the report of the case to indicate that there was any tangible personal property belonging to her located in New

York, except that, as she is said to have owned a residence in New York in which she lived, one might perhaps infer that there was furniture in the house, and also infer that the furniture was assessed for inheritance tax purposes. Likewise there is some reference to her having taken her horses and carriages to Long Branch in the State of New Jersey in the summer, but there is nothing to show whether she kept them in New York City or elsewhere in the winter. It is perfectly clear that there is nothing in the case to show that New Jersey did tax these New York tangibles; and it is also clear that no question was raised by counsel or considered by the court as to whether such tangibles, if they were assessed, were or were not taxable. The sole question, as we have stated above, discussed and decided by the New Jersey Court was whether her domicile was in New Jersey or in New York.

The only other case that we know of where the question was decided is *Sherwood's Estate, State vs. Spokane & Eastern Trust Co.*, 211 Pac. Rep., 734 (Supreme Court of Washington, December 29, 1922).

In this case it was held that the State of Washington, which was the domicile of the decedent, could impose an inheritance tax upon personal property in California, although it included jewelry. The case involved a great many questions. The opinion is long. The proposition as to tangible property outside the state does not seem to have received any separate, careful consideration and is disposed of by a curt statement

"* * * that the succession takes place in virtue of the laws of the place of domicile" (p. 740).

What the doctrine laid down in the instant case means is well illustrated by the case of *Hogg's Estate,* in the Orphans' Court of Allegheny County, Pennsylvania, at No. 617 September Term, 1923, decided only a few weeks ago. Hogg was domiciled in Pennsylvania and died intestate. At the time of his death he had a large amount of personal property consisting of horses, cows and other livestock, agricultural products, tools and other tangible articles located on a ranch in Montana. Letters of administration were taken out in Montana; these tangible assets were all sold by the Montana administrator, the proceeds brought into the probate court of Montana for distribution, and were by that court distributed directly to the next of kin. When the Pennsylvania administrator's account was filed, the Commonwealth of Pennsylvania made claim for inheritance tax on these Montana assets which were of the value of $25,359. In an opinion filed October 24, 1923, by Judge Miller he refused to allow the tax, distinguishing the case from the instant (Frick) case upon the narrow ground that in the Hogg case "the domiciliary administrator in Pennsylvania never had, was not permitted to have, any control or jurisdiction of the assets in the State of Montana." Whereas in the *Frick estate,* "transmission thereof (that is, the foreign tangibles), to those entitled thereto, is under the laws of Pennsylvania." There is no real distinction between the two cases. We cite

the *Hogg case* to show the extreme to which the Commonwealth of Pennsylvania is going in its attempt to extend its taxing power, and also to show that the Pennsylvania courts are already finding it necessary to narrow and distinguish the instant (Frick) case in order to avoid manifestly absurd results. The real trouble is that the *Frick estate case* was wrongly decided.

This point may well be closed by quoting section 257 of a new book *The Law of the American Constitution,* by Professor Charles K. Burdick of Cornell University:

> "§257. *State Inheritance Taxes on Realty and Chattels.* State inheritance taxes have become of increasing importance in recent years, and the cases in this field frequently raise the question of jurisdiction in the taxing State. In approaching this question it should be borne in mind that the inheritance tax is not a tax on property but upon the right to take or to dispose of the property involved. There is no question that the State in which real property or chattels are located may tax their transfer. It is also clear that the state of a decedent's residence cannot tax the succession to his real property located in another State. The same should be true of chattels, for in fact it is the State where the chattels are located that controls the succession, and, though States generally follow the law of the decedent's domicile with regard to the inheritance of chattels, this is a matter of comity and not of obligation, and

the privileges granted by the State of decedent's domicile have in fact no extra territorial effect. And yet the comparatively few cases in the state courts which have dealt with a tax imposed by the State of decedent's residence upon the succession to chattels (as distinguished from intangible property) located without the State have held such a tax valid. This is only supportable under the maxim *mobilia sequuntur personam*, but, as we have seen, this has been held by the Supreme Court of the United States not to apply where a tax is sought to be imposed upon the chattel itself which is outside of the taxing State, and it is reasonably to be hoped that the Supreme Court will hold that the maxim is equally inapplicable when a State seeks to impose a tax upon the succession to chattels located outside of its jurisdiction."

POINT II.

THE STATE OF PENNSYLVANIA HAS NO POWER TO LEVY AN ESTATE TAX ON THE VALUE OF SHARES OF CAPITAL STOCK OF CORPORATIONS INCORPORATED UNDER THE LAWS OF OTHER STATES WITHOUT DEDUCTING THE PARAMOUNT TAXES EXACTED BY THOSE OTHER STATES AS A TRANSFER INHERITANCE TAX ON SUCH SHARES OF STOCK.

This point really involves the power of the State of Pennsylvania to tax the taxes imposed by other sovereignties.

The executors of Mr. Frick's will were confronted with this practical situation. They found that Mr. Frick owned shares of stock in a large number of corporations incorporated under the laws of other states. They found that they could not reduce any of those shares of stock to possession; that the corporations of those states were prohibited by the laws of the states which created them from making any transfers until the inheritance taxes of those states had been settled. And in order to get possession of those shares of stock so that they could administer them, they had to pay, for example, to the State of Kansas $353,887.04, a paramount lien of that state on capital stock of the Atchison, Topeka & Santa Fe Railroad, before they could secure the stock and bring it into Pennsylvania for administration. Likewise, they had to pay the State of West Virginia $329,925, a paramount tax upon the shares of stock of the Faraday Coal and Coke Company,

a corporation of West Virginia, before they could secure it and bring it into Pennsylvania for administration (Record, p. 16, Folio 27 a). The like situation confronted them in other states.

The State of Pennsylvania levied its transfer inheritance tax upon the value of these stocks as of the day of Mr. Frick's death, disregarding altogether these paramount liens. The result of this is that the estate has been compelled to pay a tax, not on their true value for administration purposes in Pennsylvania, which manifestly is their market value less the paramount tax, but upon their true value for administration purposes in Pennsylvania plus the paramount taxes.

It does not make much difference what language one uses to express this. No matter how it may be camouflaged, the result is that the State of Pennsylvania has exacted an inheritance tax, not only upon the value of the property which eventually came into its control, but upon that value plus the paramount taxes of other states. It has taxed the taxes. Its taxing officials have done this under the mandate of Section 2 of Article I of the statute (Record, p. 65, end of Folio 183 a, and beginning of Folio 184 a), which says:

> "no deduction whatsoever shall be allowed for or on account of any taxes paid on such estate to the Government of the United States or to any other state or territory."

It will be recollected that the particular language imposing the tax is that it shall be at a rate per centum upon the clear value of the

property subject to such tax, passing to or for the use of certain persons (Record, p. 65, Folio 183 a).

An attempt is made to justify this dangerous legislative policy by contending that nothing is being added to the value of the property, but that it is merely a refusal to deduct something from it.

While words may mean little, yet they may be sometimes used in a connection where they create a false impression. However what is done may be expressed, no one can controvert the fact that the State of Pennsylvania has levied a tax upon the value of that which is being administered here plus the amount actually paid to the other states in taxes. What really happened was that the executors had to take $353,887.04 in cash which had been realized by the conversion of other assets which had already been taxed by Pennsylvania to their full value, and send the money to Kansas and pay these Kansas taxes before they could secure a release of the Kansas stock. Kansas exacted an average of nearly ten per cent as an inheritance tax on the value of the Atchison, Topeka & Santa Fe stock on the day that Mr. Frick died; and that tax had to be paid before Pennsylvania could get any hold upon, or jurisdiction over, the shares of stock. With just exactly the same propriety and with the same result, Kansas might have levied its inheritance tax in kind and taken ten per cent of the shares. If it had done so, would any one contend that the State of Pennsylvania could levy an inheritance tax upon anything except the shares (ninety per

cent of the whole) which came into Pennsylvania?

So far as we have been able to find, the only courts that have ever decided the direct point are the Pennsylvania Supreme Court in this case and the California Supreme Court in *The Matter of the Estate of Henry Miller,* 184 Calif., 674 (1921). The California Supreme Court in that case reached a conclusion in direct antagonism to the decision of the Pennsylvania Supreme Court in the instant case.

The only apparent difference between the two decisions is that the Supreme Court of Pennsylvania really gives no reason for its decision, while the Supreme Court of California does. We submit that the California decision is supported by reason and authority. Among other things, Mr. Justice Olney says at p. 683:

> "The authority of the state having actual control of the subject-matter, either because it is personal property within its limits or because, as in this case, it is the stock of one of its corporations, is, of necessity, the superior. The state of the decedent's domicile can deal with the property only after the requirements of the state of its actual situs are satisfied. Putting it another way and concretely, the stock of Henry Miller in the Nevada corporation comes into his California estate, there to be administered upon and taxed, only after the requirements of Nevada are complied with, and the only thing over which California secures authority is what remains after Nevada has taken its tax."

POINT III.

THE STATE OF PENNSYLVANIA HAS NO POWER TO LEVY AN ESTATE TAX ON THE VALUE OF THE WHOLE ESTATE WITHOUT DEDUCTING THE PARAMOUNT ESTATE TAX EXACTED BY THE UNITED STATES.

When a man dies a Federal tax attaches to all his estate. The tax is imposed upon it by reason of the cessation of his ownership of the property. *Knowlton vs. Moore,* 178 U. S., 41. The estate in this case being large, and the United States tax being graduated, the United States tax was nearly all imposed in the highest bracket; so that for the purposes of this case it may fairly be stated that the estate tax was substantially twenty-five per cent of the value of Mr. Frick's property, except the part given to charity, which is not taxable.

The refusal of the State of Pennsylvania to permit the deduction of the amount of the Federal estate tax when ascertaining the measure of its own tax on transmission of the inheritance gives rise to two related questions, which must, however, be distinguished from one another.

The first question is whether the exercise by Pennsylvania of its power to tax inheritance is inconsistent with the paramount taxing power of the United States.

In *Kirkpatrick's Estate,* 275 Pa., 271 (1922), the Supreme Court of Pennsylvania disposed of

this question in favor of the state by in effect asserting the supremacy of the state's taxing power. After referring to the power of the state to create a right to inherit, the Court observed of this right p. 276:

> "It cannot be legislated out of existence or interfered with, simply because the United States sees fit to levy a graduated tax on the same subject of taxation,—a state created right."

It is to be observed that the conception of the Federal Estate tax as a tax on the right created by the State of Pennsylvania is inconsistent with the decision of this Court in *Knowlton vs. Moore,* 178 U. S., 41, which is distinctly to the effect that the Federal statute is not a tax on inheritance or transmission, but is a tax imposed upon the estate of a decedent by reason of the cessation of his ownership by death.

"The subject of the tax," the Supreme Court of Pennsylvania further declares (p. 277), "is not a matter of concurrent legislation and may be taken away by the state, leaving the United States without this subject to tax. The Federal tax is executed through its own taxing power and the Pennsylvania transfer inheritance tax is a condition imposed on the state-granted privilege —the transfer of property." *Knowlton vs. Moore* is then cited as an authority for the proposition just quoted, but is, we submit, in direct antagonism to it.

The regulation of the Treasury applicable to the Bureau of Internal Revenue with reference to this matter says:

> "The transfer of property is taxable, although it escheats to the state for lack of heirs." (Article III, Regulations 63, promulgated July 7, 1922, T. D. 3384; Corporation Trust Co's War Tax Service, 1923, p. 38.)

The majority opinion of the Supreme Court of Pennsylvania in the instant case contains a verbal recognition of Federal supremacy, but takes up and carries forward the line of thought announced in *Kirkpatrick's Estate*:

> "Given the fact," says the majority opinion (Record, p. 97, folio 240 a), "that a state may levy an inheritance tax on the value of the entire estate of a decedent, even though part of it consists of United States bonds (*Plummer vs. Coler,* 178 U. S., 115; *Orr vs. Gillman,* 183 U. S., 278) it necessarily follows that in determining the way in which this tax shall be computed it may, subject to constitutional provisions, refuse to allow any deduction for taxes paid to the United States and other states."

It is to be noted that the reason for permitting the inclusion in an estate subject to the inheritance tax of bonds of the United States is that the tax is not a tax upon property, and therefore not a tax upon the obligations of the Federal Government. The Supreme Court of Penn-

sylvania appears to infer from this undoubtedly sound proposition that the state may proceed to tax an inheritance as it pleases, even to the extent of depriving the United States of all source of payment for the Federal inheritance tax.

Additional support for this contention is sought by the majority opinion in *Bankers Trust Co. vs. Blodgett,* 260 U. S., 647, from which the following inference is drawn (Record, p. 97, folio 240 a):

> "Hence the method of calculating the amount to be paid must necessarily be one for legislative consideration, for, as there stated, 'the power of taxation with its accessorial sanctions, is a power of government, and all property is subject to it.' "

The *Blodgett case* was concerned with the right of a state to prevent tax evasion by imposing upon the estate of a decedent liability for taxes which ought to have been paid in his lifetime. It has no relation to the question under consideration, though the inference sought to be drawn from it by the Supreme Court of Pennsylvania appears to be that the method of calculating the amount of a tax rests in the unreviewable legislative discretion of the state. We submit that this assertion of the supremacy of the taxing power of the state is wholly at variance with the paramount rights of the United States, and cannot possibly be justified.

As if to relieve the rigor of this contention, the Supreme Court of Pennsylvania seeks to save

itself by the following statement (Record, p. 97, folio 240):

> "If the question of priority of right ever arises,—which American history since 1865 renders extremely doubtful,—the contention now made may become important; it does not arise here; in fact the Federal Estate Tax has long since been paid, while Pennsylvania is still seeking to collect the amount due to her."

We submit, to the contrary, that the question here presented is a question involving a constitutional principle. A state statute sustainable only upon a theory inconsistent with Federal supremacy is invalid *per se*, even if in a particular case there happens to be enough money to pay the demands of both sovereignties.

The second question raised by the refusal of Pennsylvania to allow the deduction of the Federal tax is a question concerning the due process of law clause in the fourteenth amendment. That clause forbids unjust methods of measuring a tax otherwise lawful, just as surely as it condemns tax exactions which have no lawful basis at all. A tax on a thing over which the state has jurisdiction may be void because it is confiscatory, just as clearly as a state tax law is void if it attempts to reach for taxation property beyond the jurisdiction of the state.

A franchise tax attempted to be imposed by a state upon a foreign corporation doing no business in that state would be void for lack of jurisdiction to tax.

A franchise tax laid by a state upon a corporation created under its own laws, and therefore within its jurisdiction, would likewise be invalid if the measure of the tax were to include the value of a franchise derived by the corporation under a grant from another state. This was the ground of the decision in *Louisville Ferry Co. vs. Kentucky,* 188 U. S., 385.

We repeat our assertion that it is unconstitutional to measure a state transmission tax by including the value of tangible personalty which is transmissible only under the law of another state.

In like manner, we assert that by conferring upon the Congress the power of estate taxation, we have disabled the several states from taxing as if transmitted to the heir that part of the estate which the Federal Government in fact appropriates.

Having thus called attention to the distinct, but related, questions presented by this branch of the case, we turn to the cases in which this subject has been discussed, and in which the two questions are dealt with, but not always with discrimination.

Let us turn first to the history of this principle as applied to this act as disclosed by the Pennsylvania decisions.

Prior to the enactment of the present Act of April, 1919, Pennsylvania had an inheritance tax act which imposed a tax upon "the clear value" of the estate, just as the present act does. Under that statute the Supreme Court of Pennsylvania held that, in ascertaining the clear value of the

estate, the Federal estate tax must be deducted. *Knight's Estate,* 261 Pa., 537. The present act undertook to change the law by saying (Record, page 65, beginning of Folio 184 a) that, in ascertaining the clear value of the estate, no deduction should be allowed on account of taxes paid on the estate to the government of the United States.

This presented at once a constitutional question under the Fourteenth Amendment, to wit, Is it due process of law to ascertain the value of property for the purposes of assessing a transfer inheritance tax thereon without deducting the Federal tax, and is such a course also not a violation of and an infringement upon paramount powers of the Federal government. The question first came up in the Orphans' Court of Philadelphia in *Jennie Smith's Estate,* 29 Pa. District Reports, 917, where Judge Gest held that the state had no power to do this. Judge Gest put it this way (p. 921):

> "It thus appears that the provision of the Act of 1919 is an attempt to tax the sum of $20,866.52 seized and deducted from this estate by the paramount authority and power of the Federal Government, and to this extent the presiding judge is of opinion that it transcends the power of the legislature."

This decision was followed by all the courts of Pennsylvania and acquiesced in by the state until *Kirkpatrick's Estate* came up in the Orphans' Court of Allegheny County (Pittsburgh) when

the state again raised the point. It was considered by the Orphans' Court of Allegheny County, and Judge Miller reached the same conclusion. Judge Miller puts it this way: "How can the State of Pennsylvania, by the legislation in question, collect a tax on that which no longer exists, as a duty on the clear value of what is left passing to the beneficiary?" That case was appealed by the Commonwealth of Pennsylvania and reversed. *Kirkpatrick's Estate,* 275 Pa., 271, to which we have already referred.

The instant case was heard in the Supreme Court of Pennsylvania before five justices out of the seven who constitute the court. The opinion was rendered by Justice Simpson and was concurred in by Chief Justice Von Moschzisker, Justices Walling and Kephart. Justice Frazier dissented, and filed a dissenting opinion. He says (Record, page 106, Folio 259):

> "If we concede the state tax is on the right to transmit the property and not on the property itself, still the total estate has been depleted by the amount of the federal tax and it is only the balance thus remaining decedent has a right to transfer and if the total estate is taken as the basis of the state tax, the effect is to give the state a revenue derived from a fund set aside for the benefit of the United States."

Other learned judges have been impressed by the same thought.

Mr. Justice Sweeney, in his dissenting opinion in *Hazard vs. Bliss,* 43 Rhode Island, 431 (1921), expresses the same idea as follows:

> "By operation of Federal law the net estate left by the decedent has been depleted by the amount of the tax and the deceased was deprived of the right to transfer so much of his net estate as would be required to pay the Federal Estate tax. The decedent had the right to dispose of only so much of his net estate as would be left after the deduction and payment of the Federal tax and the residuary legatee had the right to receive from the decedent only so much of his estate as would be left after the deduction and payment of the Federal Estate tax."

So Chief Justice Rugg in Massachusetts, in the case of *Hollis vs. Treasurer and Receiver General,* 242 Mass., 163 (1922), says:

> "Such a tax, apart from its technical legal significance, would be in substance and effect a tax on a tax and not a tax on the succession of property."

When we examine the decisions of this court in

McCulloch vs. State of Maryland, 17 U. S., 315;
Weston vs. City of Charleston, 27 U. S., 448;
Dobbins vs. Erie County, 41 U. S., 434;
Bank of Commerce vs. New York City, 67 U. S., 620;

Crandall vs. State of Nevada, 73 U. S., 35;
Collector vs. Day, 78 U. S., 113;
Ward vs. Maryland, 79 U. S., 418;
Railroad Company vs. Peniston, 85 U. S., 5;
Arnson vs. Murphy, 109 U. S., 238;
United States vs. Snyder, 149 U. S., 210;
Owensboro National Bank vs. Owensboro, 173 U. S., 664;
Flaherty vs. Hanson, 215 U. S., 515;
Farmers Bank vs. Minnesota, 232 U. S., 516;
Johnson vs. Maryland, 254 U. S., 51;
Smith vs. Kansas City Title Co., 255 U. S., 212;

what do we find? We deduce from these cases just what Justice Frazier deduced, and, paraphrasing the language of Mr. Justice White in *Flaherty vs. Hanson* (*supra.*), we say, 'when the state imposes such a tax, it immediately and directly places a burden upon the person who pays the United States tax, because of the payment of the tax; therefore it cannot be done.'

The State of Pennsylvania cannot directly impose a tax upon the portion of Mr. Frick's estate which the Federal Government has expropriated. It cannot do this, whether the Federal Government took it in kind or whether it took it in money. If it cannot do it directly, it cannot do it indirectly. It cannot accomplish this prohibited thing either by adding the amount of the Federal tax to the value of the taxable thing or,

if you prefer to use other language, by valuing the whole estate, that which the United States took and that which it left, and imposing a tax upon the whole without "deducting" the value of that which the United States took.

Respectfully submitted,

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